

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN M. FREEMAN,)	
)	No. CV-10-167-CI
Plaintiff,)	
)	
v.)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
MICHAEL J. ASTRUE,)	AND REMANDING FOR ADDITIONAL
Commissioner of Social)	PROCEEDINGS PURSUANT TO
Security,)	SENTENCE FOUR 42 U.S.C. §
)	405(g)
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 16, 24.) Attorney Gary R. Penar represents Plaintiff; Special Assistant United States Attorney Mathew W. Pile represents Defendant. The parties have consented to proceed before a magistrate judge. (ECF No. 4.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff John M. Freeman (Plaintiff) filed for disability insurance benefits on June 28, 2006. (Tr. 9, 99.) Plaintiff alleged an onset date of July 1, 2005. (Tr. 99.) Benefits were denied initially and on reconsideration. (Tr. 76, 81.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Hayward C. Reed on April 29, 2008. (Tr. 23-69.) Plaintiff

1 was represented by counsel and testified at the hearing. (Tr. 25-55,
2 59-60.) Vocational expert Daniel R. McKinney also testified. (Tr.
3 55-66.) The ALJ denied benefits and the Appeals Council denied
4 review. (Tr. 1, 9-20.) The instant matter is before this court
5 pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF FACTS**

7 The facts of the case are set forth in the administrative hearing
8 transcripts, and will therefore only be summarized here.

9 Plaintiff was born on August 5, 1966, and was 41 years old at the
10 time of the hearing. (Tr. 25.) Plaintiff has a bachelor of science
11 degree in business management. (Tr. 25.) He was injured in a
12 military parachuting accident in 1992. (Tr. 25.) He fractured his
13 back and sustained a partial tear of his left meniscus and a partial
14 tear of his right rotator cuff. (Tr. 26.) He had surgery on his back
15 and rods were implanted from T10 to L2. (Tr. 26.) After the
16 accident, Plaintiff remained in the military for another five years,
17 but testified he eventually left the military due to medical issues.
18 (Tr. 28.) After he left the military, Plaintiff worked as a cashier,
19 a telemarketing manager, and an assistant retail manager, but had
20 difficulty with those jobs because he was unable to lift and move
21 around as much as required, or was unable to sit at a desk as long as
22 required. (Tr. 28.) He also worked as an office assistant. (Tr. 43,
23 48.) He left his last job when he was diagnosed with stress fractures
24 in his lower back and could not keep up with his boss's demands. (Tr.
25 29, 48-49.) Plaintiff testified the Veteran's Administration has
26 declared him unemployable for medical reasons. (Tr. 29-30.)
27 Plaintiff testified his knees, shoulder and back cause pain. (Tr. 30-
28

31.) He takes methadone for pain. (Tr. 27.) He testified that he has early onset osteoporosis and he experiences side effects from methadone such as difficulty urinating and his teeth are cracking. (Tr. 38.) He wears a back brace. (Tr. 39.)

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*,

1 648 F.2d 525, 526 (9th Cir. 1980)).

2 It is the role of the trier of fact, not this court, to resolve
3 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
4 supports more than one rational interpretation, the court may not
5 substitute its judgment for that of the Commissioner. *Tackett*, 180
6 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
7 Nevertheless, a decision supported by substantial evidence will still
8 be set aside if the proper legal standards were not applied in
9 weighing the evidence and making the decision. *Browner v. Sec'y of*
10 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
11 if there is substantial evidence to support the administrative
12 findings, or if there is conflicting evidence that will support a
13 finding of either disability or nondisability, the finding of the
14 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
15 1230 (9th Cir. 1987).

16 SEQUENTIAL PROCESS

17 The Social Security Act (the "Act") defines "disability" as the
18 "inability to engage in any substantial gainful activity by reason of
19 any medically determinable physical or mental impairment which can be
20 expected to result in death or which has lasted or can be expected to
21 last for a continuous period of not less than 12 months." 42 U.S.C.
22 §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that a
23 Plaintiff shall be determined to be under a disability only if his
24 impairments are of such severity that Plaintiff is not only unable to
25 do his previous work but cannot, considering Plaintiff's age,
26 education and work experiences, engage in any other substantial
27 gainful work which exists in the national economy. 42 U.S.C. §§
28

1 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
2 consists of both medical and vocational components. *Edlund v.*
3 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

4 The Commissioner has established a five-step sequential
5 evaluation process for determining whether a claimant is disabled. 20
6 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
7 engaged in substantial gainful activities. If the claimant is engaged
8 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
9 404.1520(a)(4)(I), 416.920(a)(4)(I).

10 If the claimant is not engaged in substantial gainful activities,
11 the decision-maker proceeds to step two and determines whether the
12 claimant has a medically severe impairment or combination of
13 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If
14 the claimant does not have a severe impairment or combination of
15 impairments, the disability claim is denied.

16 If the impairment is severe, the evaluation proceeds to the third
17 step, which compares the claimant's impairment with a number of listed
18 impairments acknowledged by the Commissioner to be so severe as to
19 preclude substantial gainful activity. 20 C.F.R. §§
20 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
21 1. If the impairment meets or equals one of the listed impairments,
22 the claimant is conclusively presumed to be disabled.

23 If the impairment is not one conclusively presumed to be
24 disabling, the evaluation proceeds to the fourth step, which
25 determines whether the impairment prevents the claimant from
26 performing work he or she has performed in the past. If plaintiff is
27 able to perform his or her previous work, the claimant is not
28

1 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
2 this step, the claimant's residual functional capacity ("RFC")
3 assessment is considered.

4 If the claimant cannot perform this work, the fifth and final
5 step in the process determines whether the claimant is able to perform
6 other work in the national economy in view of his or her residual
7 functional capacity and age, education and past work experience. 20
8 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
9 U.S. 137 (1987).

10 The initial burden of proof rests upon the claimant to establish
11 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
12 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
13 1111, 1113 (9th Cir. 1999). The initial burden is met once the
14 claimant establishes that a physical or mental impairment prevents him
15 from engaging in his or her previous occupation. The burden then
16 shifts, at step five, to the Commissioner to show that (1) the
17 claimant can perform other substantial gainful activity, and (2) a
18 "significant number of jobs exist in the national economy" which the
19 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
20 1984).

21 **ALJ'S FINDINGS**

22 At step one of the sequential evaluation process, the ALJ found
23 Plaintiff has not engaged in substantial gainful activity since July
24 1, 2005, the alleged onset date. (Tr. 11.) At step two, he found
25 Plaintiff has the following severe impairments: femur osteopenia;
26 status-post fusions at T11-12, T12-L1; and herniated disc at L5. (Tr.
27 11.) At step three, the ALJ found Plaintiff does not have an
28 impairment or combination of impairments that meets or medically

1 equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P,
2 App. 1. (Tr. 12.) The ALJ then determined:

3 [C]laimant has the residual functional capacity to perform
4 essentially the full range of light work as defined in 20
5 CFR 404.1567(b) but with the following exceptions: the
6 claimant would be capable of lifting and carrying less than
7 10 pounds frequently and 20 pounds rarely; and, the claimant
8 would need to avoid stooping and crouching.

9 (Tr. 13.) (Footnote omitted.) At step four, the ALJ found Plaintiff
10 is capable of performing past relevant work. (Tr. 19.) Thus, the ALJ
11 concluded Plaintiff has not been under a disability as defined in the
12 Social Security Act from July 1, 2005, through the date of the
13 decision. (Tr. 19.)

14 ISSUES

15 The question is whether the ALJ's decision is supported by
16 substantial evidence and free of legal error. Specifically, Plaintiff
17 argues the ALJ erred by: (1) making an unsupported finding at step
18 two; (2) failing to articulate legally sufficient reasons for the
19 negative credibility finding; (3) improperly assessing the medical
20 opinion evidence; (4) making an improper RFC determination; and (5)
21 determining that Plaintiff is capable of performing past relevant
22 work. (ECF No. 17 at 17-35.) Defendant argues the ALJ: (1) properly
23 discounted Plaintiff's credibility; (2) properly evaluated the medical
24 opinion evidence; (3) resolved step two in favor of Plaintiff; (4)
25 committed harmless error in assessing Plaintiff's RFC; and (5)
26 properly concluded Plaintiff can perform past relevant work. (ECF No.
27 25 at 6-24.)

28 DISCUSSION

1. Opinion Evidence

Despite over 500 pages of record, few medical opinions are part

1 of the record in this case. The opinion evidence consists primarily
2 of the opinion of Ms. Brown, a treating nurse practitioner, and Dr.
3 Bray, an examining physician.

4 Plaintiff saw Ms. Brown relatively regularly for treatment and
5 medication management and the record contains progress notes from
6 those visits. (Tr. 171-217, 251-79, 511-35.) In October 2007, Ms.
7 Brown opined that Plaintiff was disabled and unemployable due to his
8 back injury and chronic pain management issues. (Tr. 511.) The ALJ
9 gave little weight to Ms. Brown's opinion. (Tr. 17.)

10 In September 2006, Dr. Bray examined Plaintiff and diagnosed
11 decreased range of motion with spinal deformity in the thoracic and
12 lumbar spine secondary to treatment for burst fracture of T12 with
13 Harrington rod placement, decreased shoulder range of motion secondary
14 to past rotator cuff injury, and left knee pain without significant
15 findings on physical examination. (Tr. 162.) Dr. Bray made a
16 functional assessment indicating that Plaintiff could be expected to
17 stand and walk about six hours in an eight-hour day, could be expected
18 to sit unrestricted, could lift and carry less than 10 pounds
19 frequently and 20 pounds rarely, and should not do any stooping or
20 crouching because of decreased range of motion in the lumbar spine.
21 (Tr. 162.) The ALJ gave significant weight to Dr. Bray's assessment
22 and the RFC finding is consistent with Dr. Bray's opinion. (Tr. 17-
23 18.)

24 In evaluating a disability claim, the ALJ must consider evidence
25 from medical sources. 20 C.F.R. §§ 404.1512, 416.912. Only
26 "acceptable medical sources" such as physicians and psychologists may
27 establish an impairment. 20 C.F.R. §§ 404.1513, 416.913. The ALJ is
28 also required to consider evidence from sources which are not

1 acceptable medical sources. 20 C.F.R. §§ 404.1513(d), 416.913(d);
2 S.S.R. 06-3p. "Other sources" include nurse practitioners, physician
3 assistants, therapists, teachers, social workers, spouses and other
4 non-medical sources. 20 C.F.R. §§ 404.1513(d), 416.913(d). The
5 opinion of an acceptable medical source is given more weight than that
6 of an "other source." 20 C.F.R. §§ 404.1527, 416.927; *Gomez v.*
7 *Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). However, the ALJ is
8 required to "consider observations by non-medical sources as to how an
9 impairment affects a claimant's ability to work." *Sprague v. Bowen*,
10 812 F.2d 1226, 1232 (9th Cir. 1987). Pursuant to *Dodrill v. Shalala*,
11 12 F.3d 915 (9th Cir. 1993), an ALJ is obligated to give reasons
12 "germane" to "other source" testimony before discounting it.

13 Ms. Brown is a nurse practitioner and an "other source" under 20
14 C.F.R. § 404.1513(d). The ALJ may therefore reject the opinion for
15 germane reasons. See *Dodrill*, 12 F.3d 915. Plaintiff points out that
16 a physician, Dr. Prentiss, also signed Ms. Brown's opinion letter and
17 argues that under *Gomez v. Chater*, Ms. Brown is part of an
18 interdisciplinary team and her opinion should have been assessed as
19 authored by a treating physician. 74 F.3d 967, 971 (9th Cir. 1996).
20 (ECF No. 17 at 27-28.) Plaintiff's argument is erroneous. The Social
21 Security Regulation relied upon in the *Gomez* ruling (20 C.F.R. §
22 416.913(a)(6)) has been amended and no longer includes
23 "interdisciplinary team," under the definition of "acceptable medical
24 sources." See 20 C.F.R. §§ 404.1513(a)(1-5), 416.913(a) (1-5). *Gomez*
25 therefore does not apply.

26 Even if the "interdisciplinary team" approach noted in *Gomez*
27 could apply, it does not apply in this case. There is no evidence
28 that Ms. Brown was working closely with Dr. Prentiss as the nurse

1 practitioner worked with a physician in *Gomez*.¹ To the contrary, Dr.
2 Prentiss specifically noted the patient was unknown to him and
3 indicated he had not examined the patient or read his chart. (Tr.
4 511, 534.) The record suggests that Dr. Prentiss signed Ms. Brown's
5 opinion letter only because a physician signature was required for the
6 appeal to the Board of Veteran's Appeals. (Tr. 534.) There is no
7 evidence that Ms. Brown is part of an interdisciplinary team and her
8 opinion is, therefore, that of an "other source." Accordingly, the
9 ALJ appropriately declined to give any additional weight to Ms.
10 Brown's opinion although it was signed by Dr. Prentiss. (Tr. 17.)

11 Notwithstanding, S.S.R. 06-3p advises adjudicators that opinions
12 of "other medical sources" may be given more weight than a treating
13 physician if certain factors are present. As stated in the Ruling,
14 "Each case must be adjudicated on its own merits based on a
15 consideration of the probative value of the opinions and a weighing of
16 all the evidence in that particular case." *Id.* For example, it may be
17 appropriate to give more weight to an other source than an acceptable
18 medical source if the other source has seen the claimant more often
19 and has provided better supporting evidence and a better explanation
20 for his or her opinion. *Id.*

21 In this case, the ALJ rejected Ms. Brown's opinion for several
22 reasons. First, the ALJ suggested the medical evidence does not
23 support Ms. Brown's conclusion. (Tr. 17.) Inconsistency with medical
24

25 ¹In *Gomez*, the nurse practitioner consulted with a physician
26 numerous times regarding the patient and worked closely under the
27 supervision of the physician. 74 F.3d at 971. There is no evidence
28 of a similar close working relationship in this case.

1 evidence is a germane reason for rejecting lay witness evidence.
2 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). Ms. Brown's
3 letter quotes three pieces of medical evidence in support of her
4 opinion that Plaintiff is disabled: a September 2005 MRI, an October
5 2005 note discussing an orthopedic consult, and a June 2007 lumbar
6 imaging report. (Tr. 172, 225, 236, 511.) The ALJ noted the medical
7 findings referenced in Ms. Brown's letter as a stable fusion, mild
8 degenerative problems and a herniated nucleus pulposus and suggested
9 these findings do not support Ms. Brown's opinion of disability. (Tr.
10 17.) However, the ALJ failed to note that while the 2007 MRI notes
11 Plaintiff's fusion is stable, the report also indicates new findings
12 of "diffuse osteoporosis" and a "suggestion of increasing
13 demineralization in the spine." (Tr. 236.) The only medical
14 professional in the record with an opportunity to review the 2007 MRI
15 was Ms. Brown.² Without a conflicting medical opinion which reflects
16 consideration of the same evidence Ms. Brown considered, there is no
17 basis to find the opinion is unsupported.³ Furthermore, these are not
18 the only pieces of evidence cited by Ms. Brown in support of her
19

20 ²Although the signature of Dr. Prentiss does not confer the weight
21 of acceptable medical source to the opinion since he neither reviewed
22 the file nor examined Plaintiff, it does suggest that he read Ms.
23 Brown's letter and concluded the listed findings support the
24 conclusion reached.

25 ³Other circuits have warned ALJs against substituting their own
26 medical judgment for a doctor's or interpreting raw medical data in
27 functional terms. *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir.
28 1990); see also *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999).

1 opinion. Ms. Brown also noted Plaintiff's chronic pain despite
2 methadone pain management program, attendance at pain management
3 classes, and attempts at physical therapy. (Tr. 511.) As a result,
4 the suggestion that Ms. Brown's opinion is not supported by the
5 medical evidence is not well-supported by substantial evidence in the
6 record and is, therefore, not a germane reason for rejecting the
7 opinion.

8 Second, the ALJ found that Ms. Brown's records do not include
9 results of any testing of Plaintiff's physical abilities or assessment
10 of limitations and concluded that Ms. Brown relied primarily on
11 Plaintiff's reports of pain, which the ALJ determined are not
12 credible. (Tr. 17.) A physician's opinion may be rejected if it is
13 based on a claimant's subjective complaints which were properly
14 discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001);
15 *Fair*, 885 F.2d at 604. However, nearly every record from Ms. Brown
16 notes observations of pain behavior or objective interpretations of
17 pain, including: Plaintiff used his hand to push himself into an
18 upright standing position (Tr. 214); significant difficulty walking
19 from the waiting room to exam room with guarding posture, frequently
20 moving positions in chair, slow to stand, appears to be in a lot of
21 pain (Tr. 208); appears to be in a great deal of pain walking and
22 moving from chair to exam table, spine is tender to palpation (Tr.
23 197); observed sitting uncomfortably in chair, changing positions
24 often, tender thoracic spine to light palpation and manipulation or
25 movement (Tr. 171); fidgeting in chair to gain comfort (Tr. 251);
26 appears to be in a bit of pain, guarding low back and changing
27 positions frequently. (Tr. 530.) There is no suggestion from Ms.
28 Brown that Plaintiff's behavior was inconsistent with the pain alleged

1 or appeared to be a performance. Thus, the ALJ's second reason for
2 rejecting Ms. Brown's opinion is not supported by the record and is
3 therefore not a germane reason for rejecting the opinion.

4 Third, citing S.S.R. 96-5p, the ALJ rejected Ms. Brown's opinion
5 because opinions that a claimant "cannot work," "is disabled," or "is
6 unemployable" are not given controlling weight or special significance
7 because the determination of disability is an issue reserved to the
8 Commissioner. (Tr. 17.) While the ALJ is correct that such opinions
9 are not controlling, the Ruling goes on to state that opinions on
10 issues reserved to the Commissioner must not be disregarded and must
11 be assessed to determine the extent to which the opinion is supported
12 by the record. S.S.R. 96-5p. Although Ms. Brown gave an opinion on
13 an issue reserved to the Commissioner, her opinion should not be
14 disqualified from consideration by the ALJ on that basis, and her
15 statement of disability does not constitute a germane reason for
16 rejecting the opinion. See *Reddick v. Chater*, 157 F.3d 715, 725 (9th
17 Cir. 1998) ("[R]easons for rejecting a treating doctor's credible
18 opinion on disability are comparable to those required for rejecting
19 a treating doctor's medical opinion").

20 Based on the foregoing, the ALJ failed to identify a germane
21 reason for rejecting the opinion of Ms. Brown. Without the opinion of
22 Ms. Brown, there is no medical opinion considered by the ALJ based on
23 evidence after the date of Dr. Bray's report in 2006, including over
24 two years of the record. This evidence includes many of Ms. Brown's
25 observations and notes, the 2007 MRI with findings of increasing
26 osteoporosis, and the results of a bone density scan indicating low
27 bone density. Furthermore, the ALJ failed to acknowledge Ms. Brown is
28 the only source in the record with a long-standing treating

1 relationship, an important factor when there are only two medical
2 opinions considered by the ALJ. See S.S.R. 06-3p. As a result, the
3 ALJ erred by rejecting the opinion of Ms. Brown.

4 **2. Credibility**

5 Plaintiff argues the ALJ erred by rejecting Plaintiff's testimony
6 without articulating legally sufficient reasons. (ECF No. 17 at 21-
7 25.) In social security proceedings, the claimant must prove the
8 existence of a physical or mental impairment by providing medical
9 evidence consisting of signs, symptoms, and laboratory findings; the
10 claimant's own statement of symptoms alone will not suffice. 20
11 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
12 the basis of a medically determinable impairment which can be shown to
13 be the cause of the symptoms. 20 C.F.R. § 416.929.

14 Once medical evidence of an underlying impairment has been shown,
15 medical findings are not required to support the alleged severity of
16 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
17 If there is evidence of a medically determinable impairment likely to
18 cause an alleged symptom and there is no evidence of malingering, the
19 ALJ must provide specific and cogent reasons for rejecting a
20 claimant's subjective complaints. *Id.* at 346. The ALJ may not
21 discredit pain testimony merely because a claimant's reported degree
22 of pain is unsupported by objective medical findings. *Fair v. Bowen*,
23 885 F.2d 597, 601 (9th Cir. 1989). The following factors may also be
24 considered: (1) the claimant's reputation for truthfulness; (2)
25 inconsistencies in the claimant's testimony or between his testimony
26 and his conduct; (3) claimant's daily living activities; (4)
27 claimant's work record; and (5) testimony from physicians or third
28 parties concerning the nature, severity, and effect of claimant's

1 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

2 If the ALJ finds that the claimant's testimony as to the severity
3 of her pain and impairments is unreliable, the ALJ must make a
4 credibility determination with findings sufficiently specific to
5 permit the court to conclude that the ALJ did not arbitrarily
6 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 595, 601-02
7 (9th Cir. 1999). In the absence of affirmative evidence of
8 malingering, the ALJ's reasons must be "clear and convincing."
9 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007);
10 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*, 169
11 F.3d at 599. The ALJ "must specifically identify the testimony she or
12 he finds not to be credible and must explain what evidence undermines
13 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
14 2001)(citation omitted).

15 The ALJ found Plaintiff's medically determinable impairments
16 could reasonably be expected to produce the alleged symptoms, but
17 Plaintiff's statements concerning the intensity, persistence and
18 limiting effects of those symptoms were not credible to the extent
19 they were inconsistent with the RFC finding. (Tr. 16.)

20 The ALJ noted a May 2004 statement to a health care provider that
21 despite having a rod in his back, the drive from Spokane to Seattle
22 for medical treatment did not bother Plaintiff much. (Tr. 16, 357.)
23 The ALJ also cited evidence that Plaintiff was rollerblading during
24 the summer of 2004. (Tr. 16, 186.) This evidence involves a period
25 before the alleged onset date when Plaintiff was attempting to work
26 and during which Plaintiff is not alleging disability. This evidence
27 was therefore improperly considered by the ALJ in assessing
28 Plaintiff's credibility.

1 The ALJ also concluded the evidence regarding Plaintiff's right
2 shoulder symptoms suggests a lack of credibility. (Tr. 16.)
3 Plaintiff testified he has decreased range of motion in his shoulder,
4 clicking with motion and radiating pain to his hand. (Tr. 16, 31.)
5 The ALJ concluded that Plaintiff's claims of shoulder limitation are
6 not credible since he testified he could lift 25 pounds and because he
7 has not been treated for his shoulder injury. (Tr. 16.) The ALJ also
8 asserted that on examination, Plaintiff's shoulder showed full range
9 of motion and pain only with extreme movement. (Tr. 12.) However,
10 Plaintiff estimated at the hearing he could "maybe" lift 25 pounds to
11 shoulder height, but not higher, as long as he did not have to bend.
12 (Tr. 36.) Furthermore, Plaintiff's testimony that his range of motion
13 is limited is supported by the findings of Dr. Bray, whose opinion was
14 credited by the ALJ.⁴ (Tr. 161-62.) The reviewing physician assessed
15 a limitation on reaching in all directions.⁵ (Tr. 230.) Thus, the ALJ
16 erred in concluding Plaintiff's shoulder pain is unsupported by the
17 evidence and the shoulder evidence does not support the negative
18 credibility finding.

19 The ALJ also challenges Plaintiff's credibility because Plaintiff
20

21 ⁴Although Dr. Bray diagnosed decreased shoulder range of motion
22 secondary to past rotator cuff injury, he neither assessed a
23 limitation due to that diagnosis, nor did he explain why no limitation
24 was assessed. (Tr. 162.)

25 ⁵The assessment of the reviewing physician, Dr. Platter, was not
26 mentioned by the ALJ. (Tr. 227-34.) Dr. Platter's assessment is
27 consistent with Dr. Bray's evaluation, except Dr. Platter added
28 limitations on reaching, climbing, kneeling and crawling. (Tr. 229.)

1 has received no treatment and has made few complaints about lower left
2 extremity partial numbness after August 2005. (Tr. 16.) Medical
3 treatment received to relieve pain or other symptoms is a relevant
4 factor in evaluating pain testimony. 20 C.F.R. §§ 416.929(c)(3)(iv)
5 and 416.929.(c)(3)(v). The ALJ is permitted to consider the
6 claimant's lack of treatment in making a credibility determination.
7 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The ALJ
8 correctly notes that there are few complaints of knee pain after
9 August 2005. However, Dr. Bray noted knee pain during his assessment
10 in 2006 and the reviewing physician assessed a limitation on kneeling
11 and crawling. (Tr. 161, 229.) It is also noted that the bone density
12 scan indicated low bone density in the femoral neck. (Tr. 508.)
13 Regardless, the ALJ is required to consider all impairments, even non-
14 severe impairments, in combination. 20 C.F.R. § 404.1545. In
15 assessing RFC, the adjudicator must consider limitations and
16 restrictions imposed by all of an individual's impairments, even those
17 that are not "severe." While a "not severe" impairment may not
18 significantly limit an individual's ability to do basic work
19 activities, it may be critical to the outcome of a claim when
20 considered with limitations or restrictions due to other impairments.
21 S.S.R. 96-8p. Plaintiff testified he experiences knee pain. (Tr.
22 30.) It is reasonable to consider that knee pain in combination with
23 a severe back impairment could further reduce mobility or
24 functionality. The ALJ also notes Plaintiff testified using the cane
25 prescribed for him was not practical because he loses his balance only
26 occasionally. (Tr. 39.) Plaintiff's disclosure that he does not
27 often use his prescription cane appears to reflect candor, not a lack
28 of credibility. As a result, the knee pain evidence does not reflect

1 negatively on Plaintiff's credibility.

2 The ALJ also noted Plaintiff alleged difficulty sleeping, but
3 told his provider in March 2008 that he wanted a sleep aid for those
4 rare occasions he had sleep difficulties due to pain. (Tr. 17.)
5 Plaintiff's provider actually noted, "He is having some nights where
6 it is difficult to sleep and he would like something to take on rare
7 occasion." (Tr. 512.) Although the provider's notes include the
8 phrase "rare occasion," the context suggests Plaintiff did not intend
9 to take the medication regularly rather than an indication that he has
10 sleep difficulties only rarely. Regardless, Plaintiff's request for
11 medication to assist with sleep is consistent with alleged sleep
12 difficulties, and therefore this evidence does not reflect negatively
13 on Plaintiff's credibility.

14 The remaining evidence cited by the ALJ involves activities which
15 the ALJ determined are inconsistent with Plaintiff's allegations.
16 (Tr. 16-17.) Evidence about daily activities is properly considered
17 in making a credibility determination. *Fair v. Bowen*, 885 F.2d 597,
18 603 (9th Cir. 1989). However, a claimant need not be utterly
19 incapacitated to be eligible for benefits. *Id.* It is well-
20 established that a claimant need not "vegetate in a dark room" to be
21 deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557, 561 (9th
22 Cir. 1987). Many activities are not easily transferable to what may
23 be the more grueling environment of the workplace, where it might not
24 be possible to rest or take medication. *Fair*, 885 F.2d at *id.* Yet
25 daily activities may be grounds for an adverse credibility finding if
26 a claimant is able to spend a substantial part of his day engaged in
27 pursuits involving the performance of physical functions that are
28 transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th

1 Cir. 2007). Nonetheless, a claimant should not be penalized for
2 trying to live a normal life. *Reddick v. Chater*, 157 F.3d 715, 722
3 (9th Cir. 1998).

4 The ALJ pointed out that Plaintiff identified himself as a stay-
5 at-home dad who watched his children since birth until losing custody,
6 suggesting that Plaintiff was lifting and bending while caring for his
7 children as infants. (Tr. 16-17, 251.) However, Plaintiff's children
8 were past the infant stage by the date of alleged onset.⁶ Furthermore,
9 Plaintiff pointed out at the hearing that he worked off and on until
10 2005 and was not strictly a stay-at-home dad, which is supported by
11 the record. (Tr. 53.) Plaintiff also told a provider in 2005 that he
12 stays at home with his children but cannot do lifting, consistent with
13 his complaints at the hearing. (Tr. 31-36, 172.)

14 The ALJ also found significant that Plaintiff informed his health
15 care provider in November 2007 his goals were to continue to be active
16 and continue to do things with his children, which the ALJ concluded
17 is inconsistent with limitations alleged by Plaintiff at the hearing.
18 (Tr. 17.) However, Plaintiff actually indicated his treatment goals
19 with respect to physical activities were to "cont[inue] to do things
20 with kids" and his treatment goals with respect to social/recreational
21 activities were to "cont[inue] to be as active as I can be." (Tr.
22 526.) Without evidence of specific activities, it is unreasonable to
23 infer that to "do things" with kids or "be as active as I can be"
24 suggests a level of activity inconsistent with Plaintiff's
25 allegations. Furthermore, the statements are goals or aspirations,
26

27 ⁶Plaintiff testified his children were born in 1995, 1997 and
28 2002. (Tr. 53.)

1 not reports of specific activities. These statements do not
2 constitute clear and convincing reasons supporting a finding of a lack
3 of credibility.

4 The ALJ cited Plaintiff's statements that he was caring for his
5 three minor children aged 3, 8 and 11; was outside walking daily, was
6 capable of driving, shopped in stores for his and his children's
7 needs, used a computer daily, and was active with his children. (Tr.
8 16.) The ALJ also noted Plaintiff was active in his children's lives,
9 took them to the park, cared for their daily needs including cooking
10 and housekeeping and being a scout leader. (Tr. 16.) There is no
11 evidence indicating how long Plaintiff walks when he walks outside
12 except for Plaintiff's testimony that he can walk two blocks on a good
13 day. (Tr. 34.) The ability to drive does not itself suggest
14 Plaintiff drives for long periods of time or even regularly. In
15 October 2005, Plaintiff mentioned he stays at home with his children,
16 but cannot lift. (Tr. 172.) He testified that he checks the computer
17 periodically but does not spend long periods in sitting in front of
18 the computer. (Tr. 42.) In 2006, Dr. Bray reported Plaintiff does
19 most of the cooking and much of the housework but work requiring
20 bending is extremely difficult. (Tr. 160.) Dr. Bray noted Plaintiff
21 was a scout leader, but Plaintiff testified it was for cub scouts and
22 they did not go camping or do much. (Tr. 41.) A physical therapist
23 noted Plaintiff reported that he was very active with children, but no
24 activities are described and Plaintiff's complaints of chronic pain
25 were not questioned by the therapist. (Tr. 176, 184, 211.) Without
26 more, none of these activities is conclusive as to an activity level
27 inconsistent with Plaintiff's alleged limitations. As a result, the
28 ALJ's findings regarding Plaintiff's activities are not supported by

1 substantial evidence.

2 While the ALJ may make inferences from the evidence, they must be
3 supported by the record. *Tommasetti v. Astrue*, 533 F.3d 1035, 1040
4 (9th Cir. 2008). Many of the ALJ's inferences about Plaintiff's
5 activities assume facts not established by the record. As a result,
6 the conclusion that Plaintiff's activities undermine his credibility
7 are not well-supported by the record. Furthermore, the ALJ
8 improperly considered evidence of Plaintiff's activities from before
9 the alleged onset date. Thus, the ALJ failed to provide clear and
10 convincing reasons supported by substantial evidence to justify the
11 negative credibility finding.

12 **3. Duty to Develop the Record**

13 In addition to errors in rejecting Ms. Brown's opinion and the
14 credibility finding, the ALJ also erred by failing to develop the
15 record. In Social Security cases, the ALJ has a special duty to
16 develop the record fully and fairly and to ensure that the claimant's
17 interests are considered, even when the claimant is represented by
18 counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001);
19 *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). An ALJ's duty to
20 develop the record further is triggered only when there is ambiguous
21 evidence or when the record is inadequate to allow for proper
22 evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150. In this
23 case, the ALJ should have further developed the record because in the
24 record are specific references to examinations by specialists which
25 appear relevant. Ms. Brown's August 26, 2005, note mentions Plaintiff
26 had an upcoming appointment with a Seattle neurologist on September
27 23, 2005. (Tr. 208.) Ms. Brown's November 28, 2006, progress notes
28 mentions a "Seattle ortho note. 10/05" and "was evaluated by Seattle

1 O[r]tho last year" for back pain and leg weakness. (Tr. 172.) The
2 court concludes the ALJ's duty to develop the record was triggered by
3 evidence suggesting additional specialist reports may be available.

4 Additionally, as Plaintiff points out, nearly two years of
5 medical evidence exist after Dr. Bray's 2006 assessment, including a
6 pain management evaluation and orthopedic consultation mentioned in
7 November 2006, a bone densitometry test in September 2007, and
8 additional treatment with Ms. Brown at the VA. (Tr. 172, 508, 512-
9 56.) There is no opinion from an acceptable medical source which
10 takes into account these records. If Ms. Brown's opinion was properly
11 rejected, there is no opinion from any medical source assessing
12 Plaintiff's condition after 2006, despite continuing treatment,
13 reports of pain, and new findings on the 2007 MRI. For these reasons,
14 the medical record should have been further developed. A new medical
15 examination or the opinion of a medical expert may have been helpful
16 in assessing the totality of the evidence.

17 It is also noted that the VA assessed a disability rating of the
18 whole person of 70% in 1999. (Tr. 18, 153-58.) The ALJ pointed out
19 that Plaintiff continued to work for over five years after the VA
20 rated him 70% disabled, indicating that the VA disability rating does
21 not necessarily correspond to actual disability. (Tr. 18.) Indeed,
22 a partial VA disability rating may cut against an SSA determination
23 that the individual could not perform remunerative work at any time.
24 *McLeod v. Astrue*, 640 F.3d 881, 886 (9th Cir. 2011). However, the
25 record suggests Plaintiff sought review of his VA disability rating
26 and an appeal was pending at the time of the hearing. (Tr. 54-55.) A
27 VA determination of disability is not conclusive as to disability but
28

1 should be given great weight.⁷ *Id.* When there is a likelihood of a
2 new or updated VA disability rating, the ALJ has a duty to inquire.
3 See *McLeod*, 640 F.3d at *id.* Thus, on remand the ALJ should inquire as
4 to the status of Plaintiff's VA disability rating and give appropriate
5 weight to the findings.

6 **3. Remand**

7 Because the ALJ's credibility finding and rejection of the
8 treating nurse practitioner opinion are based on error and ambiguities
9 in the evidence, the ALJ's other findings are also in question. On
10 remand, the ALJ shall develop the record by requesting additional
11 evidence from the Seattle VA and any other relevant source, shall
12 request an updated VA disability rating if available, and shall
13 request a new medical examination and any other evidence deemed
14 relevant or necessary to develop the record. After developing the
15 record, the ALJ shall make new findings consistent with the five-step
16 sequential process, and shall in particular: identify all severe and
17 non-severe impairments supported by the evidence at step two; make a
18 new credibility determination; explain the weight given to the medical
19 evidence and give legally sufficient reasons for rejecting any opinion
20 evidence; formulate a new RFC including consideration of the impact of
21 all impairments, even those determined not severe, and the side
22 effects of medication; comply with the mandatory requirements of 96-
23 8p; and make a new step four finding.

26 ⁷VA total disability ratings are limited to those impairments
27 "sufficient to render it impossible for the average person to follow
28 a substantially gainful occupation." 38 C.F.R. § 4.15.

CONCLUSION

Having reviewed the record and the ALJ's findings, this court concludes the ALJ's decision is not supported by substantial evidence and is based on legal error. On remand, the ALJ should develop the record and make new findings consistent with the contents of this order. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is **GRANTED**. The matter is remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is **DENIED**.

3. An application for attorney fees may be filed by separate motion.

DATED October 3, 2011.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE